ALEXANDER L. STEVAS,
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

No. 81-

THE SUPREME COURT OF VIRGINIA
and
LAWRENCE W. I'ANSON,
In His Official Capacity
As Chief Justice Of The Supreme Court Of Virginia,
Appellants,

v.

CONSUMERS UNION OF THE UNITED STATES, INC., and
VIRGINIA CITIZENS CONSUMER COUNCIL,
Appellees.

On Appeal from the United States District Court for the Eastern District of Virginia

MOTION TO DEFER CONSIDERATION OF JURISDICTIONAL STATEMENT

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THE SUPREME COURT OF VIRGINIA and LAWRENCE W. I'ANSON, In His Official Capacity As Chief Justice of The Supreme Court of Virginia, *Appellants,* v. CONSUMERS UNION OF THE UNITED STATES, INC., *et al.* *Appellees.*	)	No.

MOTION TO DEFER CONSIDERATION OF JURISDICTIONAL STATEMENT

On January 28, 1981, Appellants, The Supreme Court of Virginia and its Chief Justice in his official capacity noticed their appeal pursuant to 28 U.S.C. § 1253 from the Order of the three Judge District Court directing Appellants to pay a reasonable sum to Appellees as attorneys' fees. The January 8, 1981, Order of the District Court which is the subject of this appeal has also been appealed to the United States Court of Appeals for the Fourth Circuit. Appellants have informed the Court of Appeals that they desire to pursue the appeal in that forum.

Although Appellants believe that the appeal to this Court is well taken for the reasons stated in the Jurisdictional Statement, Appellants respectfully move that consideration of the Jurisdictional Statement be deferred pending action by the Court of Appeals for the following reasons.

First, Appellants regard the appeal to this Court as a protective appeal to prevent procedural problems which might arise in the event the Court of Appeals determines that it lacks

appellate jurisdiction. *Cf. Norton* v. *Mathews,* 427 U.S. 524, 531 (1976); *Turner* v. *City of Memphis,* 369 U.S. 350 (1962); *Stainback* v. *Mo Hock Ke Lok Po,* 336 U.S. 368 (1949).

Second, recent decisions suggest that Appellants should proceed initially on these issues before the Court of Appeals. Indeed, in its previous consideration by this Court, *Supreme Court of Virginia* v. *Consumers Union,* 446 U.S. 719, 737 n. 16 (1980), the Court observed that it would lack appellate jurisdiction under 28 U.S.C. § 1253 to decide the attorneys' fee question had it alone been appealed. The Court relied upon *Rosado* v. *Wyman,* 397 U.S. 397 (1970) which approved the appeal of nonconstitutional pendent issues to the Court of Appeals rather than direct appeal to this Court under 28 U.S.C. § 1253.

Other cases hold that issues should be heard initially by the Court of Appeals if the issues could have been decided by a single district judge. *Allen* v. *Board of Elections,* 393 U.S. 544 (1969); *Hagans* v. *Lavine,* 415 U.S. 528 (1974); *Gonzalez* v. *Automatic Employees Credit Union,* 419 U.S. 90 (1974); *MTM, Inc.* v. *Baxley,* 420 U.S. 799 (1975). A single district judge has the power to assess costs. *Public Service Commission* v. *Brashear Freight Lines, Inc.,* 312 U.S. 621 (1941).

Finally, since the District Court improperly construed the mandate of this Court, the January 8, 1981 Order is properly reviewable by this Court pursuant to its mandamus powers. *Vendo Co.* v. *Lektro-Vend Corp.,* 434 U.S. 425 (1978); *Connor* v. *Coleman,* 440 U.S. 612 (1979); *Bucolo* v. *Adkins,* 424 U.S. 641 (1976). However, because the mandate is the law of the case, it is reviewable by either appeal or mandamus. *In Re Sanford Fork & Tool Co.,* 160 U.S. 247, 255 (1895). Where appeal is an appropriate means of review, the Court of Appeals should have the first opportunity to consider the case. *In Re Tiffany,* 252 U.S. 32, 27 (1920). Review in the first instance by the Fourth Circuit would provide this Court with the "mediating wisdom of a court of appeals." *MTM, Inc.* v. *Baxley,* 420 U.S. 799, 803 (1975). This principle seems most in accord with

the more recent authority discouraging direct appeal of nonconstitutional issues. Accordingly, Appellants move this Court to defer consideration of the Jurisdictional Statement pending resolution of the appeal by the Court of Appeals for the Fourth Circuit.

Respectfully submitted,

THE SUPREME COURT
OF VIRGINIA
and
THE HONORABLE
LAWRENCE W. I'ANSON,
its Chief Justice,
Appellants.

By /s/ MARSHALL COLEMAN

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CERTIFICATE

I, Marshall Coleman, Attorney General of Virginia, a member of the Bar of the Supreme Court of the United States, and counsel for the Supreme Court of Virginia and the Chief Justice, hereby certify that three copies of this Motion To Defer Consideration of Jurisdictional Statement have been served upon each counsel of record for the parties herein by mailing same first-class postage prepaid, this the 30th day of March, 1981, as follows:

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All parties required to be served have been served.

/s/ MARSHALL COLEMAN

Marshall Coleman
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